Supreme Court, U.S.
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No. 98-1438

In The

Supreme Court of the United States

October Term, 1998

THE CITY OF CONCORD,

Petitioner,

v.

NEIL S. HARDIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals abuse its discretion in declining to consider two of Petitioner's arguments on appeal that were not properly raised in the district court?

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STATEMENT OF THE CASE

Petitioner City of Concord ("City") complains the Ninth Circuit abused its discretion in deciding that the City had not properly raised in the district court two issues that the City raised on appeal. The City does not and cannot claim the Ninth Circuit's unpublished memorandum decision conflicts with the decision of any other court of appeals. It does not and cannot claim that the issue is important enough to merit the Court's attention. It simply seeks relief from its own errors.

A. The Petition Misstates the Ample Evidence of Sexual Harassment and Retaliation

Plaintiff below Rita Hardin ("Hardin")[1] asserted claims under the California Fair Employment and Housing Act (Cal Gov't Code §§ 12900 *et seq.*) ("FEHA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and California common law for sexual harassment, retaliation and wrongful constructive discharge by her employer, the City, and its former Mayor, Byron Campbell ("Campbell").

In an attempt to portray the jury verdict as based on supposedly inadmissible evidence, the City omits the overwhelming evidence that (i) Campbell sexually harassed Hardin, (ii) the City failed to take appropriate corrective action, and (iii) both Campbell and the City retaliated against her for opposing sexual harassment.

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[1] Rita Hardin died while the case was on appeal. Her widower, Neil Hardin, substituted as the Plaintiff and is Respondent here.

The facts that support the verdict but which were omitted from the Petition are as follows:

After a career in local government, Hardin in June 1990 became Concord's first female city manager. (SER 2077-81.) The day Hardin became city manager she was told by a colleague "welcome to the city manager's wing; your mayor has his hands all over the women." (SER 2088.) Hardin soon learned through personal experience and observation that this statement was accurate.

Because Campbell spent ten to eighteen hours a day, 365 days a year, in the mayor's office in city hall (SER 1915, 2045-46), he had ample opportunity to harass Hardin and other women employees. From the beginning, Campbell put his arm on Hardin's shoulder and waist as they walked. (SER 1862-63, 2093-94.) On one of the occasions Campbell had his arm around Hardin's waist, he slid his hand up under Hardin's breast and pushed his fingers into her breast. (SER 2110-11.) Campbell would also rest his hand on her thigh while she was driving him to official meetings. (SER 2111-13.) When Hardin would ask him to remove his hand, sometimes he complied, sometimes he did not. (SER 2113.)

Hardin observed Campbell leering at and touching other women employees. She soon learned of numerous other complaints against him by other female employees. (SER 1802-09, 1819, 1823, 1848-51, 1861, 2089-94, 2118-23, 2155-57, 2384-86.)

Hardin realized that she had to counsel Campbell about sexual harassment. (SER 2097.) She and the personnel director warned Campbell that his conduct towards female employees was unwelcome, and, if not curbed

(SER 1988-2008, 2094-2101), might lead to problems for him and the City. Campbell pressed for the names of the complainants and asked that there be no written record of the meeting. (SER 2098, 2100.)

Shortly thereafter, Campbell called Hardin into his office late one evening, closed the door, backed her up against the wall, and "exploded." (SER 2105.) Claiming that his political career would be ruined and demanding the names of the complainants, he told Hardin, "I got you this job; I will take it away from you." (SER 2106.) Campbell demanded Hardin fire the personnel director. (SER 2108.) Campbell also concluded that Hardin should be fired. (SER 2055A-55B.) Campbell later told Hardin to forget this meeting had ever occurred. (SER 2784.)

Campbell instructed Hardin about what he wanted her to do to quell the "rumors" of harassment:

- Fire or fine employees who talked about him or spread "rumors" of sexual harassment (SER 2114);
- Develop a "vindication" plan (SER 2115-16, 2150);
- Form a committee, headed by his wife, to interview and discipline employees (SER 2116);
- Hire an attorney to sue employees he suspected of spreading rumors (SER 2117);
- Ready a press release saying that Campbell had been warned that there were "unfounded" rumors of sexual harassment circulating, but the City had investigated and confirmed there was no truth to them (SER 2131-32).

When Hardin declined to vindicate him, Campbell asked a subordinate employee to take responsibility for the vindication plan. (SER 2281.)

Because Hardin refused to vindicate him (SER 2132-36, 2350-51), he retaliated against her in many ways. (SER 2136-37; ER 1592-94.) In 1991, Hardin sought a modest salary raise. (SER 2142-47, 2372-83.) Knowing the other councilmembers were split, Campbell told Hardin he would support a raise if she went out of town with him to develop a vindication plan. (SER 2004-05, 2149-50.) When she refused, he voted against the salary raise, which was defeated. (SER 1977.) Hardin told other councilmembers of Campbell's proposed pact, but they did nothing.[2] (SER 1975-84, 2008-09, 2153-54.)

In the winter of 1991, a formal harassment charge against Campbell was filed by a college intern. (ER 974, 1002, 1014-15.) During a lengthy investigation, the City's counsel interviewed dozens of witnesses, including Hardin and thereafter released a report concluding Campbell had indeed harassed women employees. Campbell went on television, angrily denied harassing anyone, and claimed that he had been railroaded. He called Hardin the "instigator" and placed the blame for his problems "at Hardin's doorstep." (SER 1824-25, 2049-2055E).

Afraid to meet with Campbell alone, Hardin designated her deputy to conduct the weekly briefings with

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[2] He later told her she would "make out like a bandit" if she would tell the other councilmembers that her belief Campbell had tried to bribe her was a misunderstanding. (SER 2154A.)

Campbell in her place. (SER 2158-64.) The City criticized her for not meeting with Campbell herself and instructed Hardin to resume direct meetings with him. (SER 2165.)

After the release of the sexual harassment report, a deluge of negative letters about Hardin appeared in the press (ER 422A-E). The circumstantial evidence was overwhelming that Campbell was behind them. (*Id.*; SER 2010, 2020-21, 2171-72, 2226-29.) Hardin asked the City to let her respond to the letters. (SER 2174-75.) The councilmembers refused. (SER 2170, 2176, 2395.) They ignored her request to hire a lawyer to speak to Campbell's lawyer about a cease-fire. (SER 2179-81, 2276-78.) Instead, the councilmembers told her that their opinions of her work were negatively impacted by these letters and her future success depended on her ability to accommodate and get along with Campbell. (SER 2041-43, 2182-83, 2250.)

Ultimately, councilmembers lost patience with Hardin because she continued to insist upon relief from Campbell's relentless retaliation, and they fired her in September 1992 in a dramatic closed meeting which one councilmember described as the "ugliest" event of *her* life.

Hardin was unable to find a job as a city manager again until May 1995, when she took a position in a small community in Southern California at a much lower salary. (SER 2217.)

B. The Petition Misstates the Proceedings Below Related to the City's Failure to Preserve the Argument Hardin Was Exempt from Title VII

Hardin's Complaint against the City and Campbell, filed in April 1993, stated claims under California's FEHA, Title VII and under California common law. The City answered, but it did not move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction.

Shortly before trial, the City filed a motion for summary judgment arguing, among other things, that Hardin was a policymaker not covered by its civil service system and was therefore not protected by Title VII pursuant to 42 U.S.C. § 2000e(f). It did *not* argue, as it now does, that the policymaker exclusion presented a pure legal issue which had to be decided based solely on state or local statutes or ordinances. To the contrary, it told the court that the "determination as to whether a public employee is exempt as an appointee on the policymaking level is a *factual* inquiry to be based upon the *facts* and *circumstances* of the employment relationship between the complaining official and the elected officials and the *evidence* presented as to the complaining official's level of authority and scope of duties." (SER 1775; emphasis added.) The City's position was thus exactly opposite of the position it now takes that resolution of the policymaker exclusion can never turn on the facts about the plaintiff's actual job duties. The district court denied the City's summary judgment motion. (*See* App. A43.)

The City now says that the district court entered factual findings pursuant to Federal Rule of Civil Procedure 56(d) and thereafter precluded it from presenting the issue to the jury. (Pet. at 18-19.) This is untrue. The district court made no such findings; it simply denied the motion and ordered that Hardin's "[f]irst cause of action for violation of Title VII and for violation of Hardin's civil rights under FEHA" (App. A44) "remain[s] for trial." (App. A43.)

The City proposed no jury instructions about the policymaker exclusion, and it did not argue the issue to the jury at the first trial. It moved for judgment on Hardin's Title VII claim pursuant to Federal Rule of Civil Procedure 50 based on the trial testimony of a former city manager who testified that he believed the city manager's position was not subject to the civil service laws. The district court denied the motion.

During the second trial, the City offered no evidence, argument or instructions about the policymaker exclusion and it did not object to any testimony related thereto. Nor the did City file a Rule 50 motion for judgment. After the jury rendered its verdict in favor of Hardin on the Title VII, FEHA and constructive discharge claims, the City's motions for a new trial did not argue that Hardin was excluded from the protections of Title VII.

C. The City Did Not Raise First Amendment Objections

Before the first trial, Campbell moved in limine only to prohibit any witness from referring to the letters to the

local newspaper that were critical of Hardin as "fake letters" or "from using the terminology 'hostile or negative letter-writing campaign.' " (ER 343, 355.) Campbell's motions *did not mention the First Amendment*, or seek the exclusion of the letters themselves or testimony about the letters.

At the trial, witnesses testified about the letters, the letter-writing campaign and the City's refusal to help. (ER 562-69.) Neither Campbell nor the City objected to any of this testimony on First Amendment or other grounds.

The only objection that even referred to the First Amendment was made to the admission of one exhibit, which contained all the letters, and it was not the First Amendment claim that the City now argues. (ER 796A-98.)[3] After stating that admitting all of the letters would come "close" to violating the First Amendment, Campbell (not the City) argued that admitting the letters and holding him responsible simply because he associated with their authors – without proof that he had instigated the letters – would violate his First Amendment associational rights. (ER 797-98.)[4] The City never

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[3] The primary objections were foundation, relevance, and the practical problems of a bulk exhibit. (ER 796A.)

[4] Absent some . . . foundational basis that Mr. Campbell . . . wrote . . . or solicited these letters . . . , to let the letters come in under the guise of circumstantial evidence is . . . *starting to get close to infringement* upon First Amendment rights, because later on, if needed, these people will come in and explain what they did, in terms of writing the letters. (ER 797-98; emphasis added.)

asserted that admitting the letters would violate any of *its* First Amendment rights.

The district court sustained the objection to the admission of the letters, *in toto*, but it said it would admit three letters chosen at random. Neither Campbell nor the City objected. Instead, Campbell said since the jury had already heard about the number of letters (*i.e.*, the damage had already been done by testimony that came in without objection), he wanted to testify that he had had nothing to do with them, and that if any letters were introduced, he also wanted to submit testimony from their authors that he had not requested the letters. *Id.*

Rather than admit three letters randomly, the City and Campbell stipulated with Hardin that (i) there were three critical letters before and 67 after December 31, 1991; (ii) the letters' authors would testify that Campbell had not asked them to write the letters; (iii) Campbell denied any involvement in instigating the letter writing campaign; and (iv) the letters could not be introduced nor their authors subpoenaed, but that the parties:

> could examine other witnesses on the subject of the letters relating to Mrs. Hardin's claims of unlawful harassment and retaliation by defendants in the spring of 1992. (ER 556-58.)

Campbell explained:

> [T]he notion that by association with these people, . . . he somehow could be charged . . . with instigating a hostile letter-writing campaign, . . . violates Mr. Campbell's First Amendment rights . . . and that's the additional concern about a circumstantial evidence case with these letters. (*Id.*)

The City's assertion in the Petition that it entered into this stipulation only because the district court had rejected its attempt to exclude all reference to the letters is a misrepresentation. It never asked the district court to exclude *testimony* about the letters, and the stipulation arose after the district court *sustained* Campbell's objection to the admission of the letters, not after rejecting any First Amendment objection by the City.

The City's insistence on the same stipulation at the second trial – without stating any First Amendment objection (ER 549-69, 570-71, 1721, 1725) – constituted another waiver of any First Amendment objection to that evidence.

REASONS FOR DENYING THE WRIT

The Petition presents no issue meriting the Court's attention: The record belies the City's factual recitation; the Ninth Circuit did not abuse its discretion in rejecting the City's arguments which had not been properly raised below; and no intercircuit conflicts exist for the Court to resolve.

1. The Lower Courts' Decision Not to Find Hardin Excluded from Title VII Does Not Merit Review

a. The Exclusion of Policymakers from Federal Title VII's Protection Does Not Present a Jurisdictional Issue

Title VII excludes from its protection public employees who are appointees on the policymaker level

and who are not subject to civil service laws. 42 U.S.C. § 2000e(f) (1994). The exclusion does not affect subject matter jurisdiction, as this Court explained in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, ___, 118 S. Ct. 1003, ___, 140 L. Ed. 2d 210, 223-224 (1998):

> As we stated in *Bell v. Hood*, 327 U.S. 678, 682, 90 L. Ed. 939, 66 S. Ct. 773 (1946), "[J]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." . . . [Jurisdiction exists] unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.*, at 682-683; [additional citations omitted]. Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974) [additional citation omitted].

The Fifth Circuit squarely addressed the policymaker jurisdictional argument in *Clark v. Tarrant County*, 798 F.2d 736, 742 (5th Cir. 1986) and held that the question whether the Title VII plaintiff was an excluded policymaker does not affect jurisdiction. No intercircuit conflict exists.[5]

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[5] The City's reliance on *Stillians v. Iowa*, 843 F.2d 276, 278 (8th Cir. 1988), *EEOC v. Board of Trustees*, 723 F.2d 509, 510 (6th

b. The City Waived Its Policymaker Exclusion Argument by Failing to Raise the Issue at the Second Trial

The Ninth Circuit properly declined to review Petitioner's claim of error in the denial of its motions for summary judgment and for judgment as a matter of law at the first trial on an appeal from judgment entered after the second trial. The absence of a Rule 50(b) motion in the district court deprives the appellate court of power to consider appellant's request for judgment as a matter law. The Ninth Circuit (App. A2) correctly relied on *Desrosiers v. Flight Int'l*, 156 F.3d 952, 957 (9th Cir. 1998) (holding appellate court lacks power to consider request for judgment as a matter of law when no Rule 50(b) motion made below); *Lum v. City of Honolulu*, 963 F.2d 1167, 1169-70 (9th Cir. 1992) (holding denial of summary judgment motion unreviewable after jury has heard the case); *Basciano v. Reinecke*, 313 F.2d 542, 544 (2d Cir. 1963) (holding that ruling on Rule 50(b) motion at a first trial is unreviewable on appeal from judgment following a second trial).

c. The Verdict Would Stand Even if There Had Been an Error on the Policymaker Issue

The jury found the City liable for sexual harassment and retaliation under *both* California's FEHA and Title

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Cir. 1983), *EEOC v. Reno*, 758 F.2d 581 (11th Cir. 1985) and *Monce v. City of San Diego*, 895 F.2d 560 (9th Cir. 1990) is misplaced because none of the cases addressed subject matter jurisdiction.

VII. (ER 659-62, 666-67.) Thus, the verdict would survive even if the Title VII claim had failed.

d. The Ninth Circuit Did Not Hold that the Policymaker Exclusion Must Always Be Presented to the Jury

Contrary to the City's assertion, the Ninth Circuit did not hold that the policymaker exclusion must always be decided by the jury. Rather, it decided the City waived the issue because, after failing to prevail on summary judgment, the City abandoned the issue by failing to present it to the jury. (App. A2.)

The position that the City takes now – that the applicability of the exclusion must in every case be decided by the court solely by reference to state and local laws – was not only not raised below, it is inconsistent with the City's position below – that coverage depends on the facts and circumstances of the plaintiff's employment. The Ninth Circuit was correct in finding the City waived the policymaker issue. Its decision does not conflict with a decision of any other circuit.[6]

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[6] The City claims *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996); *Stillians v. Iowa*, 843 F.2d 276 (8th Cir. 1988); and *EEOC v. Board of Trustees*, 723 F.2d 509 (6th Cir. 1983) hold the policymaker exclusion must always be decided by the court. This is incorrect. Although the issue was resolved as a matter of law in those particular cases, none of them held the issue must always be decided by the court. Indeed, those courts have in other cases refused to decide the issue as a matter of law. *See e.g., Kolman v. Sheahan*, 31 F.3d 429, 433 (7th Cir. 1994) (reversing dismissal and remanding "so that the facts about the plaintiffs' jobs can be developed in the district court.").

2. The Ninth Circuit Correctly Concluded that the City Waived Any Evidentiary Objections Based on the First Amendment

The City stipulated to almost all of the evidence to which it now belatedly objects. The City waived any such evidentiary objections because they were not made in the district court. The Ninth Circuit's conclusion that no plain error occurred is correct.

CONCLUSION

The Petition should be denied because it is legally frivolous.

Dated: April 9, 1999

Respectfully submitted,

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